Among the various enforcement mechanisms, 47 U.S.C. § 401(b) provides for enforcement of FCC Orders by those harmed. 47 U.S.C. § 401(b) provides as follows:

> If any person fails or neglects to obey any order of the [Federal Communications] Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If after hearing, that court determines that the order was regularly made and duly served, and that person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

In *South Central Bell Telephone Company v. Louisiana Public Service Commission*, 744 F.2d 1107 (5th Cir. 1984) vacated on other grounds 106 S. Ct. 2884, the Fifth Circuit, interpreting § 401(b), stated:

> Under § 401(b), a party seeking enforcement of an FCC declaration may obtain an injunction upon finding that (1) the declaration is an FCC "order" within the meaning of the Act, (2) the order was regularly made and duly served upon the defendant, (3) the defendant is in disobedience of the order, and (4) the party seeking the injunction has been injured by the defendant's disobedience.

Id. at 1114-1115. *See also, Alltel Tennessee, Inc. v. Tennessee Public Service Comm'n.*, 913 F.2d 305, 308 (6th Cir. 1990); *Hawaiian Tel. Co. v. Public Utils. Comm'n.*, 827 F.2d 1264,

1270-72 (9th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988); *Chesapeake & Potomac Tel. Co. v. Public Serv. Comm'n.*, 748 F.2d 879, 880-81 (4th Cir. 1984), *vacated and remanded for proceedings consistent with Louisiana Pub. Serv. Comm'n. v. FCC*, 476 U.S. 445 (1986); *South Central Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n.*, 744 F.2d 1107, 1115 (5th Cir. 1984), *vacated and remanded for consideration in light of Chesapeake & Potomac*, 476 U.S. 1166 (1986); *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n.*, 740 F.2d 566, 571 (7th Cir. 1984); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n.*, 738 F.2d 901 (8th Cir. 1984), *vacated and remanded for consideration in light of Chesapeake & Potomac*, 476 U.S. 1167 (1986).

An FCC declaration is an "order," if the "agency acts in accordance with its legislatively delegating rule making authority" and intends it to be binding on all applicable persons. *Id.* at 1115. Via 46 U.S.C. §§ 151 and 301, Congress gave the FCC the authority to promulgate the rules. Once they are published in the Federal Register and become part of the CFR, they are Orders. On their face, the ESN Orders are "orders" prohibiting individuals, *inter alia*, from using cellular phones with altered ESNs or from altering ESNs in cellular phones. These orders have been codified in the C.F.R.

In order to show that an order was duly served, the Fifth Circuit has stated:

> Thus, the requirement of "due service" is met if the defendant in a § 401(b) proceeding received notice legally sufficient to make the order enforceable. Under the APA [Administrative Procedures Act], a rule is enforceable once it is published in a Federal Register. 5 U.S.C. § 522(a)(1). The Supreme Court has held that

> appearance of a rule in that publication constitutes legal notice to the general public.

Id. at 1119. (cites omitted). The FCC adopted the ESN Orders pursuant to lawful notice and rule making procedures under the APA, and the referenced ESN Orders were published in the Federal Register. It is clear that the third requirement of § 401(b) is met because Defendants admit that they emulate or clone cellular phones. Finally, the fourth requirement, concerning injury to Plaintiffs, has been met.

Defendants have raised a number of arguments, none of which have merit. Defendants assert that a cloned or emulated cellular phone is really a public service created by Defendants. Defendants argue that the second phone is nothing but an extension phone, similar to an extension phone in a home or a second cable outlet in a home. However, this argument does not get around the fact that the cloned phone violates federal regulations or the fact that the cloned phone causes problems for the cellular network. The FCC has already disagreed with this argument. 76 RR 2d at pp. 14-16, pars. 54-63 (Second ESN Order). A network can distinguish between cellular phones with the same telephone number but different ESNs. The FCC noted that:

> [T]he ESN rule will not prevent a consumer from having two cellular phones with the same telephone number. Changing the ESN emitted by a cellular telephone to be the same as that emitted by another cellular telephone does not create an "extension" cellular telephone. Rather, it merely makes it impossible for the cellular system to distinguish between the two telephones. (76 RR 2d 1 at p. 15, par. 59 (Second ESN Order).

Defendants argue that the ESN Orders are either not orders or are not enforceable pursuant to § 401(b). Orders of the FCC are enforceable under § 401(b). *South Central Bell Telephone Co. v. Louisiana Public Service Comm.*, 744 F.2d 1107, 1115 (5th Cir. 1984), vacated and remanded for consideration in light of *Chesapeake & Potomac*, 476 U.S. 1166 (1986). The argument that the FCC was only setting policies and did not issue orders is equally incorrect. The First and Second ESN Orders are themselves orders and also resulted in the adoption of 47 C.F.R. § 22.915 (now § 22.933) and 47 C.F.R. § 22.919. The orders and the C.F.R. specifically require that each cellular phone have its own unique ESN.

In the Second ESN Order, at ¶¶ 54-63, the FCC provided a legislative history of its determination that 47 C.F.R. §§ 22.933 and 22.919(a) should be adopted or readopted. While the discussion is not an order, the remainder is an order specifically adopted in the C.F.R.

Defendants next argue that the FCC Orders were not regularly made. The C.F.R.s, promulgated in 1981 and 1994 and which prohibit ESN emulation activities, were regularly made and duly served in accordance with the requirements of the Administrative Procedures Act. The 1994 rule revisions were adopted effective January 1, 1995, and all related rulemaking dockets were terminated (FCC Report and Order 94-201, p. 49, Ordering Clauses 110-113). 47 U.S.C. § 408 provides that the FCC's rulemaking Order is in full force and effect.

Defendants argue that they are not C2+ Technology and therefore do not violate the C.F.R.s. Defendants may use other types of software and hardware to produce the same

result as C2+ Technology, but they still violate the orders and the C.F.R.s because they emulate a cellular phone's ESN. The discussion in the Second ESN Order, paragraph 62, concerns C2+ Technology, because that was the company which filed a comment on the issue with the FCC. The order and the C.F.R.s do not limit themselves to C2+ Technology.

Defendants also assert that they are not servicing any cellular equipment for which type acceptance (approval) occurred after January 1, 1995, and therefore their activities cannot be enjoined under 47 C.F.R. § 22.919(b) and (c). Subsection (a) prohibits ESN emulation regardless of the date of type acceptance for cellular equipment. 47 C.F.R. § 22.919(a) was restating the emulation prohibition the FCC had established in 1981 in 47 C.F.R. § 22.915 (now § 22.933). Subsections (b) and (c) established new antifraud manufacturing specifications to make it even more difficult for entities, such as Defendants, to tamper with ESNs.

Defendants argue that the FCC is reconsidering its rulings. Because a bureau of the FCC's staff may have held a meeting to discuss some issues related to cloning does not mean that the current orders and C.F.R.s are no longer valid. 47 CFR §1.427 provides that the rules of the Commission are effective within 30 days of publication in the Federal Register. 47 CFR §1.429(k) provides that a filing of a petition for reconsideration does not stay or postpone the enforcement of rules or excuse a person from failing to comply with those rules. A filing of a petition for reconsideration does stay a rule if there is a specific order of the FCC to that effect. In this case, the FCC has issued no orders staying the effect of its rules. There has been no evidence of a new rulemaking docket established by the FCC to begin a revision of its rules. Since 1981, the FCC's position has been clear. The mere possibility that, at some future date,

a rule change will occur does not indicate what the rule change will be and does not change the fact that Defendants are violating 47 C.F.R. §§ 22.933 and 22.919(a).

Finally, Defendants raise the issue of primary jurisdiction. As the court in *Alltel Tennessee, Inc. v. Tennessee Public Service Comm.*, 913 F.2d 305 (6th Cir. 1990) stated:

> The principal reasons for the doctrine of primary jurisdiction are to obtain the benefit of the expertise and experience of the administrative agencies and the desirable uniformity which occurs when a specialized agency decides certain administrative questions. 913 F.2d at 309.

In this matter, the FCC has stated on no less than five occasions, in 1981, 1991, 1992, 1993, and 1994, that the activities of Defendants are in violation of 47 C.F.R. §§ 22.933 and 22.919(a).

The Court notes that the FCC will not allow cellular phones to operate on radio frequencies unless there is type acceptance of the equipment and the cellular phone is licensed by the FCC. The license by the FCC of each cellular phone is provided via the FCCs blanket license to each cellular carrier. Defendants do not have a license, and the phones they clone are therefore unlicensed by the FCC and should not be in service.

Part II

18 U.S.C. § 1029

This Court has the power to enjoin specific violations of a criminal statute pursuant to FRCP 65. *National Association of Letter Carriers v. Independent Postal Systems*

of America, Inc., 470 F2d 265, 271 (10th Cir 1972); In re *Eugene Debs* 158 US 564, 15 S. Ct. 900, 39 L Ed 1092 (1895).

18 U.S.C. § 1029 prohibits Defendants from producing, using, trafficking in, or possessing counterfeit or unauthorized access devices. 18 U.S.C. § 1029(a)(1), (2), and (3); from having control, custody of, or possession of device-making equipment designed to make a counterfeit access device and with the intent to defraud. 18 U.S.C. § 1029(a)(4); from possessing telecommunications instruments that have been modified or altered to obtain unauthorized use of telecommunications services, *i.e.*, the use of cellular networks. 18 U.S.C. § 1029(a)(5); and from having hardware or software used to alter or modify telecommunications instruments. 18 U.S.C. § 1029(a)(6)(B). Defendants have violated these provisions and have also violated 18 U.S.C. § 1029(a)(5) (the second subsection 5) because Defendants have received more than $1,000 during a one-year period. Defendants have violated the second 18 U.S.C. § 1029(a)(6) because they have knowingly and with the intent to defraud, solicited persons for the purposes of offering access devices.

The issue of "free-riding" was addressed in *U.S. v. Brady*, 820 F.Supp. 1346 (Dist. Utah 1993), aff'd. at 13 F.3d 334 (10th Cir. 1993). In dicta, the court explained that a cloned cellular phone would be an access device pursuant to 18 U.S.C. § 1029. While courts have had differing opinions concerning whether activities under 18 U.S.C. § 1029 must result in a bill to a legitimate account, it is clear that cloning does bill a legitimate account.

The only opinion directly addressing the applicability of 18 U.S.C. § 1029 to cloning is that rendered by Judge Forester on December 13, 1995, in *United States of America*

v. Don Billy Yates, Jr., Criminal Action No. 95-72, United States District Court for the Eastern District of Kentucky, Lexington. As noted by Judge Forester on the last two pages of his opinion, Congress specifically amended § 1029(a) to criminalize cloning. Congress stated that:

> This section amends the counterfeit access device law to criminalize the use of cellular phones that are altered, or "cloned," to allow free riding on the cellular phone system. Specifically, this section prohibits the use of an altered telecommunications instrument, or a scanning receiver, hardware or software, to obtain access to telecommunications services for the purpose of defrauding the carrier. A scanning receiver is defined as a device used to intercept illegally wire, oral or electronic communications. The penalty for violating this new section is imprisonment for up to fifteen years and a fine of the greater of the $50,000 or twice the value obtained by the offense. House Report H.R. No. 103-8271.

The facts in *Yates* are remarkably similar to the facts admitted by Defendants in this matter. In *Yates*, the U.S. Secret Service had received information that the defendant was cloning cellular telephones by "providing customers with an 'extension phone' so that they could have two cellular telephones with the same number, while paying the activation charge and maintenance fee for only one cellular telephone." *Id.* at 6. *Yates* made many of the same arguments raised here by Defendants, including claiming that the carrier was not harmed by the conduct. The court correctly rejected those arguments, holding that "[b]y cloning cellular telephones to enable users to have an extension phone, the cellular carriers are defrauded of the activation fee and the monthly service fee they charge for each cellular phone." *Id.* at 8.

We conclude, as did Judge Forester, that cloning cellular phones violates 18 USC § 1029.

IT IS HEREBY ORDERED that:

1. Defendants altering, transferring, emulating or manipulating ESN's is a violation of the FCC's ESN orders and regulations, as well as 18 USC 1029, and aids and assists others in violating the FCC's ESN orders and regulations.

2. Marshall, Marshland and their officers, agents, servants, employees, and those persons or entities in active participation with them who receive actual notice of this order, are hereby permanently enjoined from altering, transferring, emulating or manipulating the ESNs of cellular telephones.

3. Defendants are ordered to maintain all records, computer discs, and other information concerning altered telephones in their current state.

4. Defendants shall produce any and all records computer discs, and other documentation or information relating to the altering, transferring, emulating or manipulating of cellular telephones, the servicing of clients, and responses to inquiries about altering, transferring, emulating, or manipulating the ESN of cellular telephones to Plaintiffs within ten days of the date of this order.

5. Defendant shall promptly provide to Plaintiffs information, not contained in written records produced to Plaintiffs, concerning Defendants altering, transferring, emulating or manipulating ESNs, including, but not limited to, the identity of all customers who have had cellular telephones altered, transferred, emulated or manipulated and monies received for said services.

6. Plaintiffs shall recover their costs from Defendants.

7. Final Judgment is entered accordingly.

SO ORDERED, this _____ day of _____, 199___.

ANTHONY A. ALAIMO
JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

CERTIFICATE OF SERVICE

I, WILBUR D. OWENS, III, do hereby certify that I have this day served a true and correct copy of the above and foregoing Order by hand delivery on December 28, 1995, to:

Richard Phillips, Esq.
P.O. Box 69
Ludowici, Georgia 31316-0069

This 27th day of December, 1995.

BOUHAN, WILLIAMS & LEVY LLP

By: _____
WILBUR D. OWENS, III

Post Office Box 2139
Savannah, Georgia 31498-1001
(912) 236-2491

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA BRUNSWICK DIVISION

PALMER WIRELESS, INC., d/b/a CELLULAR ONE, and GEORGIA R.S.A. #12 PARTNERSHIP, d/b/a Alltel Mobile,	:	CIVIL ACTION
Plaintiffs,	:	
vs.	:	
FRANCES E. ("BUNNY") MARSHALL, and MARSHLAND COMMUNICATIONS, INC.,	:	
Defendants.	:	NO. CV295-201

AMENDMENT TO FINDINGS OF FACT AND CONCLUSIONS OF LAW ENTERED ON DECEMBER 29, 1995

The findings of fact and conclusions of law, entered on December 29, 1995, are amended by the following:

Conclusion of Law Number Twelve, reciting that Defendants violated 18 U.S.C. § 1029 is withdrawn. That statute requires a specific intent to defraud. To the contrary, Defendants' actions were open and notorious and evidenced no intentional fraudulent conduct. The Court concludes that Defendants did not knowingly violate 18 U.S.C. § 1029.

SO ORDERED, this 22nd day of January, 1996.

JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

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(Rev. 8/82)